VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., *Editor.*

BEIRNE STEDMAN, *Associate Editor.*

Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS

It is our sad duty to chronicle the death of our Associate Editor, Chas. E. Savage, Jr., who departed this life since the last issue of the REGISTER.

Death of Associate Editor.

Mr. Savage was born in Norfolk, Va., on May 4, 1894, where he resided until he entered the University of Virginia Law School from which he was an honor graduate. Since leaving college he has been a member of the Editorial Staff of the Michie Company, by whom he was held in high esteem for his industry and exceptional ability.

As a law-writer he was a conscientious and consistent worker with a remarkable aptitude for his chosen work. He had clearness in exposition, keenness of criticism, depth of learning, and a strong and vigorous understanding. He was gifted with a remarkable memory and an unusually sound legal judgment.

Mr. Savage became Associate Editor in October, 1918, but for over a year before then had rendered valuable assistance to the Editors of the REGISTER and had contributed articles and notes to its pages. The last issue contained an article by him entitled "The Proper Designation of Married Women in Legal Proceedings."

He was gifted with unfailing patience and uniform courtesy. His heart was fraught with kindness and his mind was tolerant to all. Of him it may be truly said, "He had charity, tolerance and generosity." He was a boon companion; a "fellow of infinite jest." Cheerful under all circumstances, his sunny disposition brought brightness with his presence. He had endeared himself to his employers and associates, who have, in addition to the bar at large, sustained a great loss in his untimely death.

The Associated Press Case—Literary Property in News—"Pirating" News as Unfair Competition.

On Dec. 18, 1918 the Supreme Court of the United States in International News Service *v.* Associated Press, 39 Sup. Ct. 68, handed down a very important decision relating to the rights of those who gather news for sale. The court was divided but the majority opinion, delivered by Mr. Justice Pitney, held that the Associated Press, a news service gathering news for sale and distribution among its subscribers or members is entitled to an injunction restraining a competitor from "pirating" its news "until its commercial value as news to the complainant and its members had passed away."

The Associated Press, which was complainant in the District Court, is a co-operative organization, its members being either proprietors or representatives of about 950 daily newspapers published in the United States. It gathers in all parts of the world news and intelligence of current and recent events for daily distribution to its members for exclusive publication in their newspapers, the cost of the service amounting approximately to $3,500,000 per annum. Defendant, the International News Service, is a corporation, whose business is the gathering and selling of news to its customers and clients, consisting of about 400 newspapers published throughout the United States and abroad, a few of which are represented, also, in the membership of the Associated Press. It has widespread news-gathering agencies, operated at a cost of more than $2,000,000 per annum, and is in the keenest competition with the Associated Press in the distribution of news throughout the United States. The point argued before the Supreme Court was whether defendant could be restrained from appropriating news taken from bulletins issued by complainant or any of its members, or from newspapers published by them, for the purpose of selling it to defendant's clients. Complainant asserted that defendant's course of conduct both violated complainant's property right in the news and constituted unfair competition in business. Notwithstanding the case had proceeded only to the stage of a preliminary injunction, the

Supreme Court deemed it proper to consider these underlying questions, since they went to the very merits of the action.

Complainant's news matter was not copyrighted. It was said that it could not, in practice, be copyrighted, because of the large number of dispatches that are sent daily; and, complainant contended that news was not within the operation of the copyright act. Defendant, while apparently conceding this, nevertheless invoked the analogies of the law of literary property and copyright, insisting as its principal contention that, assuming complainant has a right of property in its news, it can be maintained (unless the copyright act be complied with) only by being kept secret and confidential, and that upon the publication with complainant's consent of uncopyrighted news of any of complainant's members in a newspaper or upon a bulletin board, the right of property is lost, and the subsequent use of the news by the public or by defendant for any purpose whatever becomes lawful.

Upon this question Justice Pitney said:

> "In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it.
>
> "No doubt news articles often possess a literary quality, and are the subject of literary property at the common law; nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands. In an early case at the circuit Mr. Justice Thompson held in effect that a newspaper was not within the protection of the copyright acts of 1790 (1 Stat. 124) and 1802 (2 Stat. 171). Clayton *v.* Stone, 2 Paine, 382, Fed. Cas. No. 2,872. But the present act is broader; it provides that the works for which copyright may be secured shall include 'all the writings of an author,' and specifically mentions 'periodicals, including newspapers.' Act of March 4, 1909, c. 320, §§ 4 and 5, 35 Stat. 1075, 1076 (Comp. St. 1916, §§ 9520, 9521). Evidently this admits to copyright a contribution to a newspaper, notwithstanding it also may convey news; and such is the practice of the copyright office, as the newspapers of the day bear witness. See Copyright Office Bulletin No. 15 (1917) pp. 7, 14, 16, 17.
>
> "But the news element—the information respecting current events contained in the literary production—is not the crea-

> tion of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries' (Const. art. 1, § 8, par. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."

In many cases the courts have recognized the rights of producers to prohibit the copying of uncopyrighted literary and dramatic compositions which have been communicated to a limited number of persons (see Wheaton *v.* Peters, 8 Pet. 591; Ferris *v.* Frohman, 223 U. S. 424, 32 Sup. Ct. 263; Thompkins *v.* Halleck, 133 Mass. 32, and cases cited in dissenting opinion of Mr. Justice Brandeis). Trade secrets not given to the public generally are protected (American Stay Co. *v.* Delaney, 211 Mass. 229, 97 N. E. 911, Ann. Cas. 1913B, 509; Macbeth-Evans Glass Co. *v.* Schnelbach, 239 Pa. 76, 86 Atl. 688, and cases cited in note in 44 L. R. A., N. S., 1160. It is also held in the "ticker cases" that "news" cannot be "pirated" before it has been communicated to the general public. (Board of Trade *v.* Christie Grain and Stock Co., 198 U S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031; Kiernan *v.* Manhattan Quotation Tel. Co. [N. Y.] 50 How. Pr. 194.) In the present case the court went further and held that it could not be "pirated" even after communicated to the public generally.

After making the statement above quoted, the learned Justice disposed of further consideration of this question in the following words:

> "We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. And, in our opinion, this does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent; nor is it foreclosed by showing that the benefits of the copyright act have been waived. We are dealing here not with restrictions upon publication but with the very facilities and processes of publication."

As seen from the above quotation the decision turned upon the question of unfair competition. The holding may be summarized as follows: It constitutes unfair competition for the International News Service to take from newspapers published by, or bulletins posted by, members of the Associated Press, news furnished by the latter, and transmit it to clients of the former, enabling them to publish in competition with, and as soon as papers of, other members of the Associated Press.

It was further held that an attempt by the International News Service to palm off its news as that of the Associated Press was not essential to unfair competition, for which equity will grant relief, but it was enough for the former to appropriate and sell as its own news gathered by the latter for the use of its members.

Another point to be noticed is that the court treated the defendants composing the Associated Press as the real plaintiffs. As to this the majority opinion said:

> "It is said that the Circuit Court of Appeals granted relief upon considerations applicable to particular members of the Associated Press, and that this was erroneous because the suit was brought by complainant as a corporate entity, and not by its members; the argument being that their interests cannot be protected in this proceeding any more than the individual rights of a stockholder can be enforced in an action brought by the corporation. From the averments of the bill, however, it is plain that the suit in substance was brought for the benefit of complainant's members, and that they would be proper parties, and, except for their numbers, perhaps necessary parties. Complainant is a proper party to conduct the suit as representing their interest; and since no specific objection, based upon the want of parties, appears to have been made below, we will treat the objection as waived."

Mr. Justice Holmes in a short and clear dissenting opinion agreed with the majority in so far as to regard the problem as one of "unfair competition," but believed that this objection to the practice of the defendant in using news gathered by the complainant would be obviated if suitable acknowledgment of its source be given. Mr. Justice McKenna concurred in this opinion.

Mr. Justice Brandeis dissented in toto from the majority opinion at length in his usual clear and convincing style. The

following short selection from his opinion may be said to summarize his views on the matter in issue:

> "The means by which the International News Service obtains news gathered by the Associated Press is also clearly unobjectionable. It is taken from papers bought in the open market or from bulletins publicly posted. No breach of contract such as the court considered to exist in Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229, 254, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; or of trust such as was present in Morison *v.* Moat, 9 Hare, 241; and neither fraud nor force is involved. The manner of use is likewise unobjectionable. No reference is made by word or by act to the Associated Press, either in transmitting the news to subscribers or by them in publishing it in their papers. Neither the International News Service nor its subscribers is gaining or seeking to gain in its business a benefit from the reputation of the Associated Press. They are merely using its product without making compensation. See Bamforth *v.* Douglass Post Card & Machine Co. (C. C.) 158 Fed. 355; Tribune Co. of Chicago *v.* Associated Press (C. C.) 116 Fed. 126. That they have a legal right to do, because the product is not property, and they do not stand in any relation to the Associated Press, either of contract or of trust, which otherwise precludes such use."

It is believed that the conclusion arrived at by the majority of the court is a wise one. A great and efficient news gathering organization operated at an enormous expense should be protected and stimulated in its endeavors to gather news for dissemination instead of being discouraged as would have happened had the views of Mr. Justice Brandeis prevailed, and the International News Service been permitted to gratuitously "pirate" the news gathered by the Associated Press from the four corners of the earth at great cost.

Patriotism the Refuge of Scoundrels.

Once upon a time Dr. Johnson, while in a cynical mood, which it must be confessed was his common state of being, said that "patriotism is the last refuge of a scoundrel." If the eminent "dictionarian" intended to cast a slur upon one of the greatest virtues of true manhood he ut-

tered one of the most collosal falsehoods of history. However he may have made the much quoted statement with an entirely different meaning just as one would say that a safe harbor is the last refuge of a pirate, or a police station the last refuge of a criminal. But, he probably intended to convey the idea that a scoundrel will put on the covering of patriotism in the same manner that a smooth crook will adopt the manners and habiliments of a gentleman and become a veritable "wolf in sheep's clothing." Undoubtedly during the past few years some scoundrels of the deepest hue in this country have covered up their dirty deeds by protestations of patriotism. It is to be hoped that the investigation being conducted by the Government as to the much heard of German propaganda which has sorely affected this country will have the effect of disclosing to the view of the people some of the nominal Americans who have been spreading the poisons of this propaganda among us. Every one who has been in any way intentionally instrumental in carrying out the schemes of the diabolical plot should be punished to the limit, and proper publicity should be given of all the proceedings of the investigation in order that the American people may be warned and never again be caught napping in this respect. It is a sad commentary upon modern American patriotism that many men of high degree, influential politicians, near statesmen, journalists of renown, and prominent educators in some of the leading universities have laid themselves liable to be classed with the human vermin referred to in the cynical utterance of Dr. Johnson. May their tribe decrease—and proper punishment and pitiless publicity will be a great aid.

Freedom of Speech and of the Press.

The First Amendment to the Constitution of the United States provides that Congress shall make no law "abridging the freedom of speech, or of the press." Of late it has been the fashion for certain agitators, I. W. W.'s, Anarchists and traitors to justify their abuse of the right of free speech, and defend their treasonable utterances, by invoking this provision of the Constitution. It is a spectacle for

men and gods to witness these enemies of the Republic attempting to use the Constitution as a shield while they attack it. They would have us believe that the guaranty "of freedom of speech and of the press" protects them in their disloyal dissertations and traitorous talk. They conceive liberty to be license and wish to invoke the bulwark against the latter to aid them in destroying the former. Fortunately the courts have so construed the constitutional guaranties and immunities that the contention of the human vermin upon the body politic is of no avail. As was said in *Robertson* v. *Baldwin,* 165 U. S. 275: "The law is perfectly well settled that the first ten amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion (*U. S.* v. *Ball,* 163 U. S. 662, 672, 16 Sup. Ct. 1192); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment (*Brown* v. *Walker,* 161 U. S. 591, 16 Sup. Ct. 644, and cases cited). Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial."

Validity of Ordinance Prohibiting Publication or Distribution of Certain Named Newspapers.

Some of the publications of Mr. William Randolph Hearst have been much criticised for having been pro-German before the United States entered the World War and against our Allies since then. The city fathers of Mt. Vernon, N. Y. went the critics one better, and on May 14, 1918 passed an ordinance making it unlawful until the end of the present war to print, publish, circulate, sell, or distribute the New York American and the New York Evening Journal, and declaring any violation of the ordinance to be a misdemeanor punishable by a fine or imprisonment. In *Star Co.* v. *Brush, Mayor et al,* 103 Misc. Rep. 631, 170 N. Y. S. 987, the Supreme Court of the Empire State held the ordinance invalid as exceeding the powers of the city under its charter, and as interfering with the freedom of the press, secured by Const. N. Y. art. 1, § 8, and Const. U. S. Amend. 1, clothing the citizen with liberty to speak, write, or publish his opinion on any and all subjects, subject, alone, to responsibility for the abuse thereof.

Counsel for the defendant referred to the state of war now existing, and seemed to imply that the attitude of the court upon this case should not be the same now as in normal times. In reply the court said: "Whether the freedom of the press, as it has heretofore existed in this country, should be restricted as a war measure, is not a question that can be presented in such a case as this. It is manifest that, if such restriction is to be imposed at all, it should be by national, and not by local, action. It would be an extraordinary and deplorable situation, if that freedom of the press, which we have so jealously guarded, and which has meant so much to us, could now of all times, when questions of such supreme importance have to be considered and decided by the people, be suppressed at the will of the aldermen or trustees of any city or village anywhere in the country. No publication would be safe. Our greatest newspapers and other organs of information and discussion would be at the mercy of little groups of local officials here and there, and would be permitted to reach the people or not, according as such groups approved or disapproved the particular news of such publications. Whatever

changes the war may necessitate, it is safe to say it will not place such power in such hands, and I say this without in the slightest degree questioning the honesty and good intentions of such officials or their competency to perform the duties for which they were elected by the people and created by the law."

It seems that the Court was clearly right in saying that such legislation should be by national, and not by, local action, even though the country be in a state of war. Apparently only one other local authority in the United States had ever before attempted to exercise such authority. The Lone Star State, living up to its reputation of being able to furnish plenty of everything but rain, gives us the case of first impression. The city council of Seguin, Tex., undertook to ordain that the Sunday Sun, a paper published in Chicago, was a public nuisance, and to prohibit its circulation within the corporate limits of the city. In *Ex parte Neill*, 32 Tex. Cr. 275, 22 S. W. 923, 40 Am. St. Rep. 776, the court declared the ordinance to be invalid and beyond the power of the common council, among other things saying: "The power to prohibit the publication of newspapers is not within the compass of legislative action in this state, and any law enacted for that purpose would clearly be in derogation of the bill of rights. 'The constitutional liberty of speech and of the press, as we understand it,' says Mr. Cooley, 'implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications for their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals; or to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply, not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords.' Cooley, Const. Lim. p. 518. To prevent the abuse of this privilege, as affecting the public, the legislature has prescribed penalties to be enforced at the suit of the state, leaving the matter of private injuries to be determined between the parties in civil proceedings. We are not informed of any authority which sustains the doctrine that

a municipal corporation is invested with the power to declare the sale of newspapers a nuisance. The power to suppress one concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene, or otherwise. The doctrine of the Constitution must prevail in this state, which clothes the citizen with liberty to speak, write, or publish his opinion on any and all subjects, subject alone to responsibility for the abuse of such privilege."

The "Gift of Gab" and the "Gab Fiend."

The talent or proclivity known in common parlance as the "gift of gab" is undoubtedly a valuable asset to the lawyer, and when properly applied and backed by brains will bring success to its possessor. But this accomplishment should be bridled and not allowed to run riot, for many an attorney has talked himself out of a possible client and lost a case because of excessive verbiage improperly applied. Even before eloquence-loving juries, and courts who hark to long-worded language, it sometimes happens that "speech is silver and silence is golden." (See "In Vacation" 4 V. L. R., N. S., 719). What counts even in courts of justice is quality and not quantity. Much talk wearies and many times have tired juries become antagonistic to the speaker's side because of long winded arguments more or less relevant to the case.

The Associate Editor gives vent to the above, not to air a personal grievance because he woefully lacks the ability to harmonize words and make the language of Shakespeare his slave in public, but merely by way of preface to the following elucidation on a pernicious enemy of lawyers and other men to whom time is figured in the coin of the realm. This enemy is the Gab Fiend—an engaging personality with no particular visible markings to identify him so that his would-be victim may escape. The one peculiar physical characteristic that sets him apart is his handy tongue which can gather a speed of sixty miles an hour from still start. He believes that the tongue was created to be tickled by talk, and so he discharges into the arid atmosphere vast volumes of inconsequential items, detailed data, and "hot air" much to the righteous disgust of lovers of quiet.

It would not only be stretching the truth, but crushing it to earth, to say that the gab fiend is a soothing solace to the busy lawyer who has planned more work for the day than he can hope to finish by midnight. Then it is that the erudite gabber proves one of the sorest trials to a member of the hardworked and generous profession. The doctor could mount his horse or get into his flivver and answer an imaginary call. The business man could remember an important engagement and flitter out of earshot, but the poor lawyer is chained to his desk and must perchance sit and squirm while the care free gabberino deposits himself on the opposite side of the desk and, unlimbering his vocal guns, turns loose a vocabularistic bombardment upon the surrounding atmosphere that would cause a maker of dictionaries to writhe in envy. What if he butchers the Queen's English and murders the Mother Tongue. It is all in his day's work and as he elucidates upon religion, politics, war and reconstruction, the weather, the crops, the stock market, the latest scandal and the outlook for Bolshevism, he gathers momentum and, as his vocal cords are not attuned to brake signals, before his dazed victim recovers his wits, several thousand cubic yards of hot air have issued from the void that ever aches to emit sounds. He so loves the sound of his own voice that he will take forty minutes to detail an experience that culminated in as many seconds. Good jokes bear but little repetition but this the gab fiend does not know for he will spend more of your time than he could pay for in having you pretend to listen to a bum joke, hoary with age, that should never have been allowed to issue forth from the cracked brain of some would-be humorist.

Pity the poor lawyer who numbers such a one among his acquaintances. 'Tis terrible to see the anguish upon his face as he tries to unravel a knotty problem or condense an already too-long brief while he who works words woefully wrings wrath from the follower of the Jealous Mistress. Of the talking of a gab fiend there is no end, and the tired traveller along the hard road which reaches the summit of legal success must fervently wish in his heart that some distressing malady like paralysis of the vocal cords would afflict him who after an hour's linguistic exercise leans across the desk and says with good grace, "Well as I was saying, etc." or "Here's another good one, etc."